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Nos. 93-1456 and 93-1828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., ET AL.,

Petitioners,

v.

RAY THORNTON, ET AL.

STATE OF ARKANSAS EX REL. WINSTON BRYANT,
ATTORNEY GENERAL OF THE STATE OF ARKANSAS,

Petitioner,

v.

BOBBIE E. HILL, ET AL.

On Writ Of Certiorari
To The Supreme Court Of Arkansas

REPLY BRIEF FOR RESPONDENTS REPRESENTATIVE JAY DICKEY AND REPRESENTATIVE TIM HUTCHINSON SUPPORTING PETITIONERS

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Respondents Bobbie E. Hill *et al.* ("Hill") and Ray Thornton ("Thornton") (collectively "respondents") and their *amici* have failed to demonstrate that Amendment 73 establishes an additional qualification for membership in Congress, or that there is any other basis on which to invalidate the Amendment. The judgment below must therefore be reversed.

I. AMENDMENT 73 DOES NOT ESTABLISH AN ADDITIONAL QUALIFICATION FOR MEMBERSHIP IN CONGRESS

As we demonstrated in our opening brief ("Dickey Br." at 11-20), the text, history, and consistent judicial construction of the Constitution compel the conclusion that the term "[q]ualifications" encompasses only those attributes that render an individual legally eligible for membership in Congress and without which a candidate cannot take office even if he or she receives a majority of the votes cast. Respondents do not seriously dispute this proposition.[1] Instead, they contend (Hill Br. 30-32; Thornton Br. 37-44) that the Qualifications Clauses prohibit the States from adopting laws that have the purpose and effect of making it difficult for a particular category of individuals to win reelection,[2] even if those laws

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[1] Indeed, Thornton effectively concedes this point. *See* Thornton Br. 44. Hill halfheartedly disagrees (Hill Br. 29-30 & n.68), noting that various dictionaries define "qualifications" in part as those attributes that render individuals "capable of being elected" or "capable of any employment." As Hill admits (Br. 29-30), however, Amendment 73 will not *always* lead to the defeat of multi-term incumbents. As a result, the attribute of non-incumbency cannot be deemed a qualification even under Hill's reading of these dictionary definitions, because not all candidates lacking that attribute are "[in]capable of being elected." Moreover, the definitions on which Hill relies plainly use the term "capable" in the sense of "having legal power or capacity" (N. Webster, *An American Dictionary of the English Language* (1828)), thus confirming the historical understanding of "qualifications" as absolute legal prerequisites to office.

[2] Respondents appear to take the position (*see* Hill Br. 30; Thornton Br. 38-40) that a law is invalid under the Qualifications Clauses if its "intent" or "purpose" is to prevent a particular class of potential candidates from winning an election. That position finds no support in cases construing the Qualifications Clauses, however, and for good reason: those cases uniformly look to whether a challenged law *establishes* an additional qualification, not to whether it was *intended* to do so. *See, e.g., Storer v. Brown*, 415 U.S. 724, 746 n.16 (1974);

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do not actually disqualify anyone from congressional service.[3]

Respondents' attempt to expand the scope of the Qualifications Clauses in this manner has absolutely no support in the text, history, or judicial construction of the Constitution. Plainly, the actual language of the Clauses does not purport to limit state power in the manner suggested. And even if the mere listing of certain qualifications in the Constitution could somehow be construed to preclude the States from imposing additional ones,[4] that result would not suggest that the Constitution also bars the imposition of other election regulations that are *not* "[q]ualifications" as that term was used in the Constitution and understood by the Framers.

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cases cited *infra* n.6 and Thornton Br. 37-38 nn. 33-35. Respondent Thornton also errs in contending (Br. 39-40) that this Court is somehow bound by the Arkansas Supreme Court plurality's statement that the "intent" of Amendment 73 was to "disqualify" multi-term incumbents. What constitutes a disqualification within the meaning of the Qualifications Clauses is a question of federal, not state, law.

[3] Relying on the comment in the plurality opinion below that write-in candidates have only "glimmers of opportunity" (93-1456 Pet. App. ("Pet. App.") 15a), respondent Thornton contends (Br. 38, 40-42) that Amendment 73 will actually render multi-term incumbents "ineligible" for office and "preclude" them from serving in Congress. That contention is patently false. The decision below does not purport to "find" that multi-term incumbents can never again serve in Congress, only that electoral success for such individuals will likely be hard-won. *See* Pet. App. 15a (plurality opinion); *id.* at 27a (Dudley, J., concurring in part and dissenting in part). Moreover, the Arkansas plurality's entirely speculative characterization of the future electoral chances of heavily financed and well-known multi-term incumbents is far from the type of state-court finding of historical fact to which deference is due by this Court.

[4] For all the reasons identified by petitioners (*see* U.S. Term Limits ("USTL") Br. 8-14, 25-50; State Br. 8-27, 36-48), we agree that such a construction would be incorrect.

Nor is there any historical support for the notion that the Framers expected or intended the Qualifications Clauses to bar state legislation that did not impose actual qualifications for membership in Congress. Indeed, respondents point to no evidence of any such understanding. They rely instead (Hill Br. 32; Thornton Br. 43-44) on general comments to the effect that "[u]nder these reasonable limitations [*i.e.*, the Qualifications Clauses], the door [to Congress] . . . is open to merit of every description," and "[n]o qualification of wealth, of birth, of religious faith, or of civil profession, is permitted to fetter the judgment or disappoint the inclination of the people." *The Federalist* No. 52, at 355 (J. Cooke ed. 1961) (J. Madison); *id.* No. 57, at 385 (J. Madison).

Those statements say nothing whatsoever about a State's ability to adopt election laws like Amendment 73 that do not preclude the voters from choosing whomever they wish to represent them in Congress.[5] At most, the cited statements can be read to suggest that, under the Constitution as written, all potential candidates would be eligible for congressional office as long as they satisfied the constitutionally prescribed minimum qualifications—a suggestion that does nothing to further respondents' case, because Amendment 73 leaves multi-term incumbents fully eligible for membership in Congress. Indeed, respondents' reading of these statements is impossible to reconcile with the Framers' explicit and repeated recognition that the States (subject only to

[5] Thornton and the Solicitor General dispute this characterization of Amendment 73, asserting that the people of Arkansas "may be prevented from electing the person they wish to choose." Thornton Br. 50; *see* SG Br. 15. Plainly, however, nothing in Amendment 73 prevents the voters of Arkansas from reelecting multi-term incumbents if they "wish to" do so; rather, the Amendment merely counterbalances the many government-supplied political advantages enjoyed by multi-term incumbents and thereby ensures that they will be reelected only if the voting public truly *does* prefer to be represented by them rather than their challengers.

congressional oversight) would have authority to regulate elections in ways that could have a profound impact on electoral outcomes. *See* Dickey Br. 14-18; *infra* pp. 9-11.

Respondents are equally unable to identify any judicial support for their novel reading of the Constitution. Indeed, in the more than 200 years of constitutional interpretation that preceded judicial consideration of Amendment 73 and similar provisions, *not one court* stated that a law leaving all candidates legally eligible for office could nonetheless violate the Qualifications Clauses. To the contrary, every court to discuss the question reached exactly the opposite conclusion.[6]

Moreover, as explained in our opening brief (Dickey Br. 11-12), this Court's decision in *Storer v. Brown*, 415 U.S. 724 (1974), compels rejection of respondents' strained reading of the Constitution. That case squarely held that a law excluding a certain class of candidates from the ballot did not violate the Qualifications Clauses because the affected candidates "would not have been disqualified" if they had been "elected at the general election." *Id.* at 746 n.16. Respondents offer no persuasive basis on which to distinguish *Storer* from this case.[7]

[6] *See, e.g.*, cases cited at Dickey Br. 19-20; *see also Stack v. Adams*, 315 F. Supp. 1295, 1298 (N.D. Fla. 1970); *State ex rel. Handley v. Superior Court*, 151 N.E.2d 508, 511 (Ind. 1958); *accord State ex rel. McCarthy v. Moore*, 92 N.W. 4, 5-6 (Minn. 1902) (reaching same result under analogous state constitutional provision).

[7] Respondent Thornton does not even cite, let alone attempt to distinguish, *Storer* on this point. Respondent Hill suggests (Br. 30) that *Storer* is distinguishable because it involved "an election ground rule, with which any would-be candidate could have complied." But "qualifications" are not defined by whether some candidates will find it impossible to comply; candidate residency requirements are plainly qualifications, yet any would-be candidate can easily satisfy them. Moreover, it is simply not true that "any would-be candidate could have complied" with the ballot-access law at issue in *Storer*, which required a showing of *both* non-affiliation with a party and substantial popular support.

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Respondents' interpretation of the Qualifications Clauses is not only precluded by text, history, and case law, it is unacceptable for yet another reason: respondents have failed to identify any judicially manageable standards for distinguishing valid from invalid election laws under their reading of the Constitution. Apparently, respondents would strike down laws under which disadvantaged candidates will "almost always" lose or "almost never" win (Hill Br. 30; *see* Thornton Br. 39), but respondents offer no principled basis for applying that "test" to uphold the multitude of existing laws that have a similar effect on large classes of candidates (including ballot-access laws, redistricting measures,[8] and

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Nor do laws "aimed at defeating certain persons because of a personal characteristic" (Hill. Br. 30-31) necessarily constitute "qualifications." The law upheld in *Storer* fell squarely within that category; its explicit purpose and effect was to discourage a certain class of candidates from running in the general election because of their status as recent party members or unsuccessful primary candidates. 415 U.S. at 735.

Finally, *Storer* cannot be distinguished on the ground that the attribute of non-incumbency is "unrelated to [a candidate's] participation in the current election process." Hill Br. 31. A law rendering candidates ineligible for office if they commit election-law violations during their campaigns would plainly impose a qualification, yet that qualification would be directly "[r]elated to" candidates' "participation in the current process."

[8] The Voting Rights Act, for example, has been construed to require States to redistrict in such a manner as to provide representation for particular racial or language-minority groups. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986). That focus on class-based results would apparently be unconstitutional under respondents' test, as would this Court's approval of redistricting measures aimed at preserving incumbents. *See generally* USTL Br. 23-25. With startling frankness, Thornton takes the position (Br. 47 n.47) that the State's power to regulate elections can be used only to preserve incumbency, not to render congressional elections more fair and open. Needless to say, nothing in the Constitution, this Court's decisions, or common sense

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the vast array of federal and state legislation providing political benefits to multi-term incumbents[9]), and indeed respondents' test would appear to invalidate many of those laws. *See* Dickey Br. 21-24.

II. AMENDMENT 73 IS A PERMISSIBLE EXERCISE OF STATE AUTHORITY TO REGULATE CONGRESSIONAL ELECTIONS

Respondents also contend (Hill Br. 32-40; Thornton Br. 44-49) that even if Amendment 73 does not violate the Qualifications Clauses it is nonetheless beyond the power of the State to enact under the Times, Places and Manner Clause.[10] That contention is without merit.

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supports Thornton's self-interested assertion; numerous cases hold that States may take appropriate steps to ensure that elections are "fair" for *all* participants. *See, e.g.*, cases cited Dickey Br. 33-34.

[9] *See, e.g.*, Dickey Br. 22-23; USTL Br. 21-25. Respondents do not explain whether their test for impermissible qualifications is satisfied by the 90-percent or higher rate of defeat for congressional challengers in recent elections, and indeed they do not even suggest how a court would go about making that determination. Presumably, however, if Amendment 73 is invalid under this amorphous test, the same fate would befall the combined advantages of multi-term incumbency. In this regard, it is worth noting that even in the most recent congressional elections, which saw an historic shift in control of both Houses of Congress, challengers had less than a one-in-ten chance of defeating incumbents (*see* USTL Reply Br. 4 n.5), and (according to Federal Election Commission data as of November 4, 1994) House incumbents outraised challengers by more than three-to-one ($192 million to $57 million).

[10] Respondent Thornton also argues (Br. 45-46) that the Times, Places and Manner Clause is not "a font of state authority to change or add to the qualifications set forth in the Constitution." That argument is effectively rebutted in petitioners' opening briefs. More to the point, however, Thornton's argument simply has no relevance to the question whether the States can enact provisions like Amendment 73 that do *not* impose additional qualifications.

Respondents do not and cannot dispute that the Times, Places and Manner Clause authorizes the States (and Congress, *see* 2 U.S.C. § 9) to regulate the "[m]anner" of electing Members of Congress by requiring that elections shall be conducted by printed or machine ballot. *See Storer v. Brown*, 415 U.S. at 730; *see generally United States v. Classic*, 313 U.S. 299, 311 (1941); 2 *The Records of the Federal Convention of 1787* 240-41 (M. Farrand ed. 1911) ("Farrand"). It necessarily follows, therefore, that the States also have the power to prescribe mechanisms for determining which candidates will (and will not) be listed on the ballot. *See, e.g., Storer v. Brown*, 415 U.S. at 730. Because Amendment 73 does nothing more than regulate access to the ballot, it falls squarely within the scope of the States' power in this regard.

Respondents nonetheless assert that the Times, Places and Manner Clause contains an implicit limitation on its facially broad grant of authority to regulate the conduct of congressional elections. In their view, the Clause permits adoption only of "evenhanded" "procedural" laws that do not "skew outcomes" or "manipulate the electoral chances of a particular group or class of candidates." Hill Br. 33, 34; Thornton Br. 45, 47.

Once again, however, respondents' position finds absolutely no support in the language or history of the Clause or in judicial decisions construing its scope. Plainly, the Clause itself contains no textual limitation of the nature suggested by respondents; to the contrary, the Clause authorizes the States to adopt *any* regulations of the "[m]anner" of conducting elections without regard to the impact those regulations might have on the electoral chances of any particular individual or group. Indeed, far from providing a judicially enforceable check on state power along the lines suggested by respondents, the Clause specifies a different limitation

entirely: state election laws are subject to modification or override by *Congress*.[11]

Nor is there any historical foundation for respondents' suggested reading of the Times, Places and Manner Clause. Indeed, despite respondents' cursory assertions to the contrary (*see* Thornton Br. 46; Hill Br. 34-35), the record is quite clear that, in the Framers' view, the Clause could, and doubtless would, be utilized to affect election outcomes in an almost unlimited variety of ways.

We have already set forth at length (Dickey Br. 16-18) the views expressed by Hamilton and Madison, both of whom plainly understood that the Times, Places and Manner Clause authorized legislation aimed at affecting or controlling election outcomes.[12] *Accord* 2 J. Story, *Commentaries on the Constitution of the United States* § 818, at 285 (1833) (recognizing the force of the argument that "the power [to regulate elections] might, in a given case, be employed in such a manner, as to promote the election of some favourite candidate, or favourite class of men, in exclusion of others").

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[11] Congress, of course, has chosen to take no action in response to Arkansas's adoption of Amendment 73.

[12] As demonstrated in our opening brief (Dickey Br. 17-18), respondent Hill's selective quotation of Hamilton's views (Hill Br. 34) is not to the contrary. While Hamilton may have believed that Congress could not impose additional *qualifications*, he never suggested that Article I implicitly limited federal power to adopt laws intended to skew election results, and in fact he assumed that Congress could adopt such laws. Similarly, respondent Thornton's characterization of Madison's views (Br. 46) is belied by the historical record. Far from asserting that "congressional manipulation of elections . . . was placed beyond Congress's authority" (*id.*), Madison conceded that the powers contained in the Times, Places and Manner Clause "might materially affect the appointments" and would allow state legislatures (and, therefore, Congress as well) "so to mould their regulations as to favor the candidate they wished to succeed." 2 Farrand 240-41; *see also* 2 *The Debate on the Constitution* 693 (B. Bailyn ed. 1993) ("Bailyn").

The views of other political leaders of the era were in unanimous accord. For example, numerous commentators opposed the Times, Places and Manner Clause's grant of power to Congress precisely *because* that body would be able to influence or control the outcome of congressional elections.[13] Supporters of the Constitution—including Convention delegates—did not dispute this description of Congress's power under the Clause. Instead, they defended that grant of power by arguing that Congress would never abuse its admitted authority to influence or dictate election results, and would exercise its power only when necessary to fill gaps in state law or to override state election laws that manipulated elections in an unfair manner.[14]

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[13] *See* 1 Bailyn 60 ("for as Congress have controul over both [the mode and places of the Representatives' election], they may govern the choice"), 100 ("Congress are to have the power of fixing the *time*, *place* and *manner* of holding elections, so as to keep them forever subjected to their influence"), 260-61 ("by a part of Art. I. Sect. 4. the general legislature may . . . evidently so regulate elections as to secure the choice of any particular description of men," and "all this may be done constitutionally"), 428 ("It is clear that, under this article, the federal legislature may institute such rules respecting elections as to lead to the choice of one description of men."), 896 ("I think it is a genuine power for Congress to perpetuate themselves"), 927 ("this is the article which is to make Congress omnipotent"); 2 Bailyn 855 ("It seems nearly to throw the whole power of election into the hands of Congress."), 859; 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 23 (J. Elliot ed. 1836) ("Elliot") ("by the 4th section [of Art. I], Congress would be enabled to control the elections of representatives").

[14] *See, e.g.*, 1 Bailyn 236, 293-94 ("does any man of common sense, really believe that the Congress will ever be guilty of so wanton an exercise of power? . . . [W]e may suppose that the State governments *may* abuse *their* power, and regulate these elections in such manner as would be highly inconvenient to the *people* . . . . And if such abuses should be attempted, will not the *people* rejoice that Congress have a *constitutional* power of correcting them?"); 2 Bailyn 693 (Madison), 857 (Congress's power under the Clause "might also be useful for this reason—lest a few powerful states should combine, and make regula-

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In sum, the Framers and their contemporaries clearly recognized that the ability to influence or even control outcomes was inherent in the States' power to regulate "[t]he Times, Places and Manner of holding Elections." They responded by placing the same power in Congress in order to provide a potential remedy for the unfair exercise of that authority by state legislatures. That remedy would have been wholly unnecessary if, as respondents contend, the Clause contained some sort of free-floating non-discrimination principle that precluded the States from adopting such laws in the first place.

Not surprisingly, this Court's cases provide no support for respondents' attempt to fashion a novel limitation on the Times, Places and Manner Clause. This Court has described the "'comprehensive words'" of the Clause as conveying "'authority to provide a complete code for congressional elections,'" *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972), a grant of power so all-encompassing that it is "matched by state control over the election process for state offices." *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986). The Court has never suggested that this "broad power" (*id.*) or "wide discretion" (*United States v. Classic*, 313 U.S. at 311) is self-limiting in the manner suggested by respondents.

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tions concerning elections, which might deprive many of the electors of a fair exercise of their rights"), 860; 2 Elliot 26-27 (arguing that absent congressional authority to override state election laws "*the power of influencing and controlling the election of the representatives of the people*, will be exerted without control by the constituents of the senators [*i.e.*, the state legislatures]") (emphasis added), 48, 49, 50-51 (Rufus King), 441 (James Wilson) ("If those [state] legislatures possessed, uncontrolled, the power of prescribing the times, places, and manner, of electing members of the House of Representatives, the members of one branch of the general legislature would be the tenants at will of the electors of the other branch [*i.e.*, the state legislatures]; and the general government would lie prostrate at the mercy of the legislatures of the several states."); 3 Elliot 367.

To the contrary, *Storer v. Brown* compels rejection of respondents' misguided interpretation of the Times, Places and Manner Clause. If, as respondents contend, the Clause does not permit States to "manipulate the electoral chances of a particular group or class of candidates" (Thornton Br. 47) or "skew outcomes against persons with undesired characteristics" (Hill Br. 34), it surely would not have allowed the State of California to exclude from the ballot—and thereby "manipulate the electoral chances" of—all independent candidates possessing the "undesired characteristic" of having recently been affiliated with a political party.

Respondents' attempt to distinguish *Storer* on the ground that it involved an "even-handed" and non-discriminatory regulation of the electoral process (Hill Br. 35-36; Thornton Br. 48) is wholly unpersuasive. In the first place, as set forth in Part III below and in our opening brief (Dickey Br. 26-29), Amendment 73 *is* evenhanded and non-discriminatory within the meaning of *Storer* and similar cases. More to the point, however, respondents' purported distinction is wholly irrelevant to the question at issue, because nothing in the Times, Places and Manner Clause suggests that it imposes any such "evenhandedness" requirement.

As the sole support for their contrary position, respondents selectively quote passages from a number of this Court's First and Fourteenth Amendment decisions. *See* Hill Br. 33, 36-38; Thornton Br. 47-48. Each of the quoted passages, however, concerns only the constraints imposed by the First or Fourteenth Amendments, and cannot possibly be read to imply the existence in the Times, Places and Manner Clause of a heretofore unknown limitation on state power.

In short, respondents have failed to identify any basis for adopting their novel interpretation of the Clause. As a result, this Court should adhere to the plain language of the

Constitution and conclude that Amendment 73 falls well within the State's power to regulate congressional elections.[15]

III. AMENDMENT 73 IS ENTIRELY CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS

Respondents' *amici* the California Democratic Party *et al.* ("CDP") and League of Women Voters *et al.* ("LWV") argue at length that this Court should invalidate Amendment 73 on the ground that it violates the First and Fourteenth Amendments. For the reasons set forth below, that argument is without merit.

A. This Court Should Not Address The Claim That Amendment 73 Violates The First Or Fourteenth Amendments

In the first place, this issue is not properly before the Court. The questions on which the Court granted certiorari in this case are limited to whether Article I of the Constitution invalidates Amendment 73 (*see* 93-1456 Pet. i; 93-1828 Pet. i), and it is well settled that *amici* are not entitled to inject additional questions beyond those set forth in the petitions. *E.g., United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981).

To be sure, a respondent may defend the judgment below on any ground that was pressed or passed upon below, but neither Thornton nor Hill presents any argument to the effect that Amendment 73 is invalid under the First and Fourteenth Amendments. Hill does make cursory reference to the arguments presented by *amicus* LWV on that issue (*see* Hill Br. 38 n.78), but this Court's Rules do not permit briefs to

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[15] Even if the Clause did not itself authorize legislation like Amendment 73, moreover, the people of Arkansas would nonetheless possess that authority by virtue of the Ninth and Tenth Amendments. *See* U.S. Const. amend. IX and X; *see also* USTL Br. 13-14.

incorporate by reference arguments and authorities set forth elsewhere. *See* Sup. Ct. R. 24.1(i), 24.2, 24.3.[16]

B. Amendment 73 Is A Valid Ballot-Access Measure That Does Not Unduly Infringe The Rights of Voters Or Candidates

In any event, the arguments presented by LWV and CDP are without merit. Amendment 73 is consistent with the First and Fourteenth Amendments because it is a reasonable, non-discriminatory ballot-access regulation that fosters the State's legitimate interests in enhancing the fairness, openness, and integrity of congressional elections. *See* Dickey Br. 24-36.

1. Amendment 73 Is Properly Subjected To Minimal Scrutiny Because It Imposes Only Minor, Nondiscriminatory Burdens On The Rights Of Voters And Candidates

As demonstrated elsewhere (*see* Dickey Br. 26-33), Amendment 73 does not trigger heightened scrutiny under the First and Fourteenth Amendments because it does not discriminate against minor parties or independent candidates and imposes only minor burdens on the rights of candidates and voters. LWV and CDP offer no persuasive response to these points.

Instead, they repeatedly assert (LWV Br. 22-24; CDP Br. 20-27; *cf.* Thornton Br. 47-49) that Amendment 73 cannot be viewed as non-discriminatory within the meaning of

[16] Moreover, respondents lack standing to raise any First or Fourteenth Amendment claim in this Court. Amendment 73 applies prospectively only (Pet. App. 25a), and thus at least one more election stands between respondents and any possible exposure to the effects of Amendment 73. As a result, respondents have suffered no present injury-in-fact sufficient to vest this Court with authority to rule on their entirely speculative claims. *See, e.g., ASARCO Inc. v. Kadish*, 490 U.S. 614, 612-13, 617-18 (1989); *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Of course, respondents' lack of standing to raise additional issues does not undermine this Court's power to consider petitioners' challenge to the judgment below. *See ASARCO Inc.*, 490 U.S. at 617-19.

this Court's First and Fourteenth Amendment jurisprudence because it directly burdens the electoral chances of a discrete group of candidates. The same was true, however, of the law upheld by this Court in *Storer v. Brown*, which barred from the ballot those independent candidates who had recently been affiliated with a political party. The *Storer* Court nonetheless had no difficulty concluding that the challenged law was non-discriminatory (415 U.S. at 733), and the same conclusion is appropriate here. *Accord Clements v. Fashing*, 457 U.S. 957 (1982).

Equally baseless is the assertion (LWV Br. 25; CDP Br. 19) that Amendment 73 somehow amounts to "invidious" discrimination against multi-term incumbents and their supporters. The opinion for the Court in *Clements v. Fashing* expressly rejected the claim that discrimination against state officeholders constitutes "invidious" discrimination (457 U.S. at 972-73), and there is no basis for LWV's and CDP's implicit assertion that federal officeholders and their supporters are any more deserving of heightened constitutional protection. Accordingly, Amendment 73 should be subjected to minimal scrutiny.

2. Amendment 73 Serves Important And Legitimate State Interests That More Than Justify Its Minimal Burden On The Rights Of Voters And Candidates

As we have already explained (Dickey Br. 33-36), Amendment 73 directly fosters the legitimate and compelling state interests in enhancing the fairness, integrity, openness, and competitiveness of congressional elections. LWV and CDP offer two principal responses: first, that the State may not rely on those interests in defending Amendment 73 because the Amendment does not actually limit the terms of congressional incumbents; and second, that favoring challengers over multi-term incumbents is not a legitimate state interest. Neither response has merit.

First, LWV and CDP fundamentally err in asserting (LWV Br. 26-27; CDP Br. 9-11) that the justifications that led this

and other courts to uphold term limits on state officeholders do not apply in the context of Amendment 73. The people of the State of Arkansas have an equally strong interest in enhancing the fairness and openness of elections for *all* of their elected representatives, whether state or federal, and thus it is immaterial that Amendment 73 applies to federal officeholders.

Nor is Amendment 73 fatally flawed because it excludes multi-term incumbents from the ballot rather than disqualifying them from office. Term-limit laws are constitutional not because they impose qualifications for office, but rather because they advance legitimate governmental interests in expanding political opportunity and enhancing the fairness, openness, and competitiveness of the political process. *See, e.g.*, cases cited Dickey Br. 36-37 n.14. Precisely those same interests are advanced by Amendment 73, and thus it too is constitutional.

Second, LWV and CDP assert that it is illegitimate for the State to legislate for the purpose of favoring challengers over multi-term incumbents. *See* LWV Br. 26; CDP Br. 20-28. As *Storer*, *Clements*, and numerous other cases make clear, however, election laws will not be invalidated merely because they favor some candidates at the expense of others. The relevant question is not whether some candidates have been disadvantaged, but rather whether the interests served by the challenged law are legitimate and substantial.

Arkansas plainly has a legitimate and substantial interest in enhancing the fairness and competitiveness of congressional elections and opening the political process to new candidates and parties; CDP and LWV point to no authority to the contrary. Moreover, "[t]he State also has the right to prevent distortion of the electoral process" (*Anderson v. Celebrezze*, 460 U.S. 780, 789 n.9 (1983)), and Arkansas may appropriately exercise that right by ensuring that multi-term incumbents do not cling to their positions for decades merely as a result of the many political advantages conferred upon them by federal law rather than "the public's support for [their] political ideas."[17] *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990).[18]

Rather than unfairly burdening those candidates who have "too much electoral support" (CDP Br. 25), Amendment 73 merely ensures that multi-term candidates who continue to win reelection do so *because* the majority of voters support them, not as a result of advantages conferred by federal law that are otherwise beyond the control of either the electorate or the State.[19] There is nothing illegitimate about the interests advanced by Amendment 73, and it should therefore be upheld.

C. Amendment 73 Does Not Impose An Impermissible Burden On The Associational Rights Of Political Parties Or Their Members

CDP and LWV also contend (CDP Br. 12-18; LWV Br. 27-30) that this Court should invalidate Amendment 73 on the ground that it violates the associational rights of politi-

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[17] CDP contends (Br. 26-27) that there is little evidence to show that multi-term incumbents actually receive substantial political benefits by virtue of their offices. The statistics relating to incumbency retention, fundraising, and the like speak for themselves, however, and in the absence of compelling evidence to the contrary the people of Arkansas were plainly entitled to proceed on the common-sense assumption that multi-term incumbents win reelection in large part because of these government-conferred advantages. *See generally* State of Wash. *amicus* Br. A1-A15.

[18] The fact that multi-term incumbents enjoy a wide array of government-conferred political advantages serves to distinguish Amendment 73 from state laws seeking to counterbalance other political advantages (such as wealth, family, and so forth) derived from other sources. Whatever the validity of state laws aimed at offsetting the latter attributes, there is no plausible basis for disputing the legitimacy of the State's approach here.

[19] *See, e.g., Weber v. Heaney*, 995 F.2d 872 (8th Cir. 1993) (state funding of congressional candidates preempted by Federal Election Campaign Act); 2 U.S.C. § 453.

cal parties and their adherents by precluding parties from selecting multi-term incumbents as party nominees in congressional elections. That contention is without merit.[20]

In the first place, this issue was not pressed or passed upon below. As a result, even respondents seeking to defend the judgment below would not be permitted to raise the issue here. *See, e.g., Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 551-552 n.3 (1990). It follows *a fortiori* that the issue cannot be injected into the case by *amici*. *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. at 60 n.2.

Second, even if the Court were otherwise inclined to reach the issue raised by CDP and LWV, it would be unable to do so in this case. Contrary to CDP's and LWV's assumption, Amendment 73 does *not* bar multi-term incumbents from the ballot in primary elections. *See* State Reply Br. 7-8 n.4. Instead, it merely prevents such individuals from having their names "placed on *the ballot for election to the United States [Senate or House of Representatives]*." Amendment 73, § 3(a) and (b) (emphasis added). Accordingly, Amendment 73 does not impinge upon the ability of political parties to nominate whomever they choose,[21] and

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[20] Even if this argument had merit, moreover, it would not lead to affirmance of the judgment below. If Arkansas law violated the federal Constitution by rendering multi-term incumbents wholly ineligible for party nomination, the solution would not be to invalidate Amendment 73—which is a provision of the state constitution—but rather to strike down Ark. Code § 7-5-525(c), the statute that bars write-in voting in primary elections. *See* Amendment 73, § 6(b) (repealing all state laws "to the extent that they conflict with this amendment").

[21] CDP nonetheless suggests (Br. 14 n.14) that multi-term incumbents can never win party nomination because Ark. Code § 7-1-101(4) would declare a "vacancy in nomination" if a multi-term incumbent were to win the primary, thereby triggering the party's obligation to select

(Footnote continued on following page)

the constitutional issue identified by CDP and LWV does not exist.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted.

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someone else to fill that "vacancy." CDP misreads Arkansas law. A "vacancy in nomination" occurs only when a party's chosen nominee cannot be certified "due to death, resignation, withdrawal, or other good and legal *cause arising subsequent to nomination*." *Id.* (emphasis added). Amendment 73 is not a "cause arising subsequent to nomination," and thus it would not create a "vacancy in nomination."